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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WAYNE WILLIAM WRIGHT, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B277062 Los Angeles County Super. Ct. No. BC606993

APPEAL from an order of the Superior Court of Los Angeles County, Teresa A. Beaudet, Judge. Affirmed.

Michel & Associates, C.D. Michel, Anna M. Barvir, Scott M. Franklin and Joshua R. Dale for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, Matthew A. Scherb, Deputy City Attorney, for Defendants and Respondents.

INTRODUCTION

In 2004, the Los Angeles Police Department (LAPD) seized appellant Wayne William Wright's extensive firearms collection—more than 400 guns, rifles, and shotguns—by executing a valid search warrant. The LAPD released some of those firearms after Wright got a court order in 2011, but ultimately destroyed the remaining firearms after it obtained a court order to do so in 2013. Wright sued in federal court but the court dismissed his claims. Wright then brought this action against the City of Los Angeles, one of its attorneys, Heather Aubry, and two LAPD detectives, Richard Tompkins and James Edwards, based on defendants' alleged "misrepresentations . . . that led to the destruction of his firearms by the LAPD." Defendants filed a special motion to strike Wright's complaint under California's anti-SLAPP statute[1] (Code Civ. Proc., § 425.16),[2] asserting Wright's claims arose from defendants' litigation conduct. The trial court granted the motion. We affirm.

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[1] "SLAPP is an acronym for strategic lawsuit against public participation." (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 76, fn. 1.)

[2] All statutory references are to the Code of Civil Procedure unless otherwise noted.

FACTS AND PROCEDURAL BACKGROUND

We summarize the facts as stated in Wright's complaint,[3] the declarations filed in support of and in opposition to the anti-SLAPP motion, and judicially noticed documents.[4]

1. *Seizure of firearms and the 2006 plea agreement*

After a 2004 sting operation, the LAPD obtained a search warrant from the Los Angeles Superior Court and seized more than 400 firearms, including an assault weapon, from Wright's residence and storage unit in Ventura County. In August 2006, Wright was convicted of one count of misdemeanor possession of an unregistered assault weapon in the Ventura Superior Court after pleading guilty. The plea agreement, reduced to a court order, stated Wright could not possess any firearms for 36 months. It ordered the seized firearms destroyed if found to be illegal or sold once Wright provided proof of ownership to LAPD.

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[3] Wright filed a first amended complaint (FAC) after defendants filed their anti-SLAPP motion but before the court heard the motion. As defendants note, "[a]llowing amendment before the hearing on the motion to strike 'would undermine the purpose of the statute—that is, quick and inexpensive disposal of meritless suits.' " (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 598-599.) While Wright's statement of facts here mostly cites his FAC, he does not argue that the FAC provides a basis for denying the anti-SLAPP motion not found in the complaint.

[4] The trial court took judicial notice of the existence of documents filed in the underlying criminal case and Wright's federal lawsuit, as well as Wright's claim filed with the City and the City's rejection of it. We also now grant the parties' respective requests for judicial notice on which we had deferred ruling.

2. *Wright seeks return of property*

A few months after pleading guilty, Wright filed motions in both the Los Angeles and Ventura courts for return of his seized property. The matter was litigated in Ventura. In January 2007, the Ventura court ordered the return of seized non-firearm property only.

From 2008 through May 2014, Wright and his counsel negotiated with LAPD officers about the kinds of records that would be sufficient for Wright to prove he owned the seized gun collection. Wright provided "proof of ownership in the form of receipts, histories, and other records detailing how he had acquired his collection." He also gave LAPD a sworn declaration of ownership.

According to the LAPD detectives, Wright went "long periods of time without making any contact, or presenting any new proof" of ownership of the guns. Edwards said that, during "one such extended period of no contact" in 2009, he told Wright's lawyer "that his guns would be destroyed without that proof."

3. *Wright's 2011 motion and the Ventura court order*

In September 2011, Wright filed another motion with the Ventura court for the return of his property—over 400 firearms, including antiques and relics, he had amassed in the last 50 years. In its opposition, LAPD agreed Wright was "presently entitled to the return of only" 26 firearms for which LAPD had Dealer Registrations of Sale (DROS) to Wright.[5] LAPD opposed the release of four other guns as contraband and the release of the remaining firearms "due to [Wright's] failure, to date, to

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[5] By 2011, Wright was no longer on probation and thus eligible to possess firearms.

provide reasonable proof of ownership." LAPD's position "remain[ed] the same" as it had been since 2007.

At the hearing on the motion, the court ordered the 26 firearms released to Wright. The court discussed the other firearms LAPD was not willing to return.[6] The court told the parties it was "withholding issuing a judgment" on the remaining firearms and instructed them to try to resolve the dispute about Wright's property among themselves. The parties could return to court if they were unable to resolve their dispute about the rest of the guns.

Right after the hearing, Wright and his counsel met with Aubry and an LAPD officer (believed to be Tompkins). According to Wright's counsel, the defendants said they would look at the additional ownership materials Wright recently had given them[7] and get back to him "to discuss where to go with this issue upon completion of LAPD's review process."

The City prepared a proposed order of the court's ruling. Wright did not object to the order, and the court signed it on October 17, 2011. The order stated the 26 firearms, identified by item number, were to be released to Wright. In Wright's view, the order reserved judgment on the firearms it did not identify.

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[6] No reporter's transcript of the 2011 hearing exists. We describe the court's statements based on a declaration by Wright's counsel, which we accept as true. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

[7] In his moving papers, Wright said he would give LAPD receipts and documents he had found. With his reply brief, he filed a declaration of ownership for those firearms for which Wright could not locate corroborating documents.

Wright alleges defendants "solicited additional receipts and proof of ownership" for the guns not listed in the 2011 order in conversations with his counsel in late September and early October 2011. He alleges defendants "did not reveal either expressly or implicitly that LAPD's position was that [the] 2011 order divested [Wright] of all ownership interest" in those remaining firearms. Instead, they "began a campaign of intentional misrepresentations to [Wright] and his attorneys designed [to] 'run the clock out' on any additional relief [Wright] could seek" from a court by misrepresenting that "Wright still had an ownership interest in the other firearms, and lying about their willingness to return them."

4. *Continued negotiations over the return of the guns*

Wright's counsel continued to negotiate with Tompkins and Edwards about the return of his guns. Wright alleges Tompkins "repeatedly lied" to Wright and his attorneys, saying the remaining firearms "would be returned to [Wright] if he provided additional proof of ownership." Tompkins said "he was reviewing or continuing to review the documentary proof of ownership of the firearms" Wright had provided.

On November 29, 2011, Tompkins emailed Wright's counsel that "LAPD was 'still working [its] way through the receipts' and that they would 'attempt to get [the work] finished by the end of [the] next week.' " In March 2012, Wright picked up from LAPD the 26 guns ordered returned. They had been fired and some had scratches or missing sights and bolts; three were significantly damaged. Other firearms had " 'disappear[ed]' " from LAPD's property division. Wright's counsel contacted Aubry and Tompkins about the missing property. Tompkins responded

LAPD was " 'making progress' " with Wright's case and he would contact counsel within the next couple of weeks.

On April 4, 2012, Tompkins sent Wright's counsel a list from Edwards of 114 firearms, including those in the 2011 order, LAPD had authorized released. Edwards already had a court order to release the additional guns. Tompkins or Edwards released more firearms to Wright (beyond those listed in the 2011 order) between the entry of that order and 2014. Wright alleges Edwards authorized the release of the additional guns "to induce Wright into forgoing any appeal or other judicial review of the [2011] order."

Wright's counsel exchanged emails with Tompkins and Edwards between April 2012 and early 2013 about issues Wright was having retrieving those firearms. In addition to the 26 firearms covered by the 2011 order, Wright ultimately retrieved another 53 guns that LAPD "returned per [the court's] meet-and-confer-instruction."

5. *Destruction order*

In December 2013, Edwards applied ex parte to the Los Angeles court—to the same judge who had approved the 2004 search warrant—for an order permitting destruction of the remaining firearms. Neither he nor Tompkins gave notice to Wright or his counsel. The court granted the application and issued the order.

Wright alleges on information and belief that defendants did not tell the Los Angeles court about the 2011 order or the Ventura court's instruction to confer about the remaining firearms. He also alleges Edwards misrepresented to the court (1) that defendants had complied with their obligation under Penal Code section 33875 to provide 180 days' notice to Wright

that the firearms were available for return before seeking to destroy them and (2) that Wright had abandoned the guns still in LAPD custody. And he alleges on information and belief that the City Attorney's Office assisted Edwards in presenting the ex parte application.

In early August 2014, Wright's counsel learned LAPD had destroyed "all but a few" of the remaining firearms.[8]

6. *The federal action*

Wright filed a claim for damages with the City in January 2015. The City denied the claim and in July 2015 Wright sued defendants and others in federal court for federal and state law claims.[9] The City moved to dismiss the federal lawsuit, in part on the ground that in its 2011 order the Ventura court implicitly ruled Wright had no ownership interest in the remaining firearms when it authorized the return of only 26 guns. Wright argued the court had not ruled on his entitlement to the remaining firearms, instead instructing the parties to confer about the return of those guns. The district court agreed with the City. In December 2015, it dismissed Wright's federal claims with prejudice and his state claims without prejudice to his refiling them in state court. Wright appealed to the Ninth Circuit.

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[8] LAPD authorized the release to Wright of one additional gun that had a DROS.

[9] Wright alleged causes of action for civil rights violations, failure to train, violation of the Racketeer Influenced and Corrupt Organizations Act, and state tort claims for conversion and trespass to chattels.

7. ***The state court action***

While Wright's federal appeal was pending, he filed this case in the Los Angeles court in January 2016. Wright alleged five causes of action. He revived his conversion and trespass to chattels claims that the federal court had dismissed, as to all defendants (the property claims). He also alleged three new causes of action against the two LAPD detectives for fraudulent deceit, tortious interference with prospective economic advantage, and tortious interference with contract (the deceit claims).

Defendants successfully moved to strike Wright's complaint under the anti-SLAPP statute. The trial court found all five causes of action arose from defendants' protected litigation-related activity. The court then found Wright could not prevail on the merits for two reasons: (1) the litigation privilege, Civil Code section 47, subdivision (b), applied "to the alleged misrepresentations that form[ed] the basis for each of [Wright's] causes of action"; and (2) to the extent his property claims did not rely on privileged communications, they were barred by the doctrine of collateral estoppel based on the federal court's finding that the 2011 order implicitly decided Wright had no legal entitlement to the remaining firearms. The court also awarded defendants $9,000 in attorney fees under section 425.16, subdivision (c).

Wright timely appealed the dismissal of his complaint. This appeal was stayed pending the outcome of the Ninth Circuit appeal.

8. ***The Ninth Circuit reversal***

In December 2017, the Ninth Circuit reversed the dismissal of Wright's federal action, finding there was "no basis for either

claim or issue preclusion," and remanded the case. (*Wright v. Beck* (9th Cir. 2017) 723 Fed.Appx. 391, 391 (*Wright*).) The court concluded the 2011 order did not implicitly find Wright had no ownership interest in the remaining firearms. (*Id.* at p. 393.) Rather, it left "the final resolution of Wright's interest in the remaining firearms for another day." (*Id.* at p. 392.)

In December 2018, while this appeal was pending, the federal district court granted defendants' motion for summary judgment.[10] Wright has appealed that ruling to the Ninth Circuit.

DISCUSSION

1. *Applicable law and standard of review*

The Legislature enacted section 425.16 due to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The anti-SLAPP statute thus provides a procedure "to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest." (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 639.) "[T]o this end," the Legislature has directed the statute be " 'construed broadly.' " (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619 (*Rand*).) When ruling on an anti-SLAPP motion, the court must "engage in a two-step process." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "A court may strike a cause of action only if the cause of action (1) arises from an act in furtherance of the right of petition

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[10] Wright's property claims were no longer before the federal court.

or free speech 'in connection with a public issue,' and (2) the plaintiff has not established 'a probability' of prevailing on the claim." (*Rand, supra*, 6 Cal.5th at pp. 619-620.)

"A defendant satisfies the first step of the analysis by demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]' [citation,] and that the plaintiff's claims in fact *arise* from that conduct [citation]." (*Rand, supra*, 6 Cal.5th at p. 620.) The categories of protected conduct include:

> "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

(§ 425.16, subd. (e).) The defendant must make this threshold showing before the burden will shift to the plaintiff to " ' "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain

a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*).)

We independently review a trial court's order granting an anti-SLAPP motion. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*).) "We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Park, supra,* 2 Cal.5th at p. 1067.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier, supra*, 29 Cal.4th at p. 89.)

2. *Prong one: arising under protected speech or petitioning activity*

Defendants contend Wright's claims arise from their protected speech or petitioning activity under section 425.16, subdivisions (e)(1) and (e)(2)—statements made "before a judicial proceeding . . . or any other official proceeding authorized by law" and statements made "in connection with an issue under consideration or review by" such a proceeding, respectively. (§ 425.16, subds. (e)(1), (e)(2).) Under these subdivisions, the defendant need not show the litigated matter is of public

interest.[11] (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 (*Briggs*).)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park, supra*, 2 Cal.5th at p. 1062.) As our Supreme Court has explained, " 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' " (*Id.* at p. 1063.) Thus, "the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' " (*Ibid.*) "Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394 (*Baral*).) "In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park,* at p. 1063.)

a. *The property claims arise from defendants' protected activity*

Defendants argue "[e]very aspect of the City's alleged wrongdoing that led to the ultimate destruction of Wright's claimed guns was 'in connection with' litigation activity,

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[11] Wright argues that, because defendants' alleged activity was noncommunicative conduct, their motion fails under subdivision (e)(4) in part because defendants did not demonstrate their actions were in furtherance of a matter of public interest. As defendants do not contend their alleged wrongful activity falls under subdivision (e)(4), we need not address Wright's contention.

including the negotiations among[ ] counsel after the 2011 Ventura order" and "the follow-through on the various court directives, especially the 2013 Los Angeles destruction order."

i. *Any liability for withholding and destroying Wright's property is based on defendants' protected litigation activity*

As our Supreme Court has explained, " '[a] cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' " (*Rusheen, supra*, 37 Cal.4th at p. 1056.) Nevertheless, Wright contends the City's acts of wrongfully withholding and destroying his property are independent, "noncommunicative conduct." He argues the elements of his property claims are met "irrespective" of any alleged misrepresentations and "do not rely on any communication at all."

We thus consider whether defendants' protected activity forms the basis of their liability as to any element of Wright's property claims. (*Park, supra*, 2 Cal.5th at p. 1063.) " ' "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by wrongful act or disposition of property rights; and (3) damages." ' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) Trespass to chattels is similar, but lies where the interference with the plaintiff's possession of property is not sufficiently important to be classed as conversion. (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1400-1401.)

Wright's property claims seek damages from the "continued wrongful exercise of control and possession over [Wright's]

personal property," the "ultimate destruction" of his property, and for damage done to his returned firearms while they were in LAPD custody. But he contends "the principal thrust" of his property claims "is the LAPD's improper retention of [his] seized property."

Although Wright characterizes his property claims as arising from noncommunicative conduct—the retention and destruction of his property—we conclude the basis of those claims arises from defendants' protected petitioning or free speech activity.[12] True, the City "executed" the disposition order by

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[12] Although Wright's complaint alleges LAPD also damaged his firearms, on appeal Wright addressed only the alleged retention and destruction of his firearms. His statement of facts in his opening brief does not mention the damaged guns and nowhere in his opening or reply brief does he argue the damage to his guns should be treated differently from the retention and destruction of them. He does not make any argument as to the damaged guns at all. We deem Wright to have forfeited any argument that his trespass to chattels cause of action is not subject to the anti-SLAPP statute based on alleged damage to the returned guns. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [failure to raise issue in opening brief waives issue on appeal]; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 [same, in anti-SLAPP suit]; *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867 [appellant must present argument and authorities on each point to which error is asserted or this issue is waived].) At oral argument, Wright's counsel clarified that the trespass to chattels claim, not the conversion claim, sought relief for damage done to his returned firearms and argued recovery for that damage is not subject to section 425.16. "We need not consider an argument not mentioned in the briefs and raised for the first time at oral

destroying the firearms—a noncommunicative act—but one of the first elements giving rise to defendants' liability is that their "exercise of dominion" over Wright's property must have been wrongful.

Wright claims the destruction of his property was wrongful because the City got the destruction order through misrepresentations to the Los Angeles court. In other words, the defendants' liability for destroying the guns is based on the way they got the court order. Had defendants destroyed Wright's property without a court order in violation of Penal Code section 1536,[13] their wrongful assertion of control over Wright's property would not have arisen from protected litigation activity. But that is not the case.

Wright alleges defendants did not notify him of their ex parte application to prevent him from opposing it, and Edwards—after consultation with the City Attorney—made misrepresentations to the Los Angeles court to get the disposition order. Those allegations fall squarely within section 425.16, subdivisions (e)(1) and (e)(2). Edwards's alleged misrepresentations to the court were made in a judicial proceeding, or at least an official proceeding authorized by law.

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argument." (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1027, fn. 2.)

[13] Penal Code section 1536 provides: "All property or things taken on a warrant must be retained by the officer in his custody, *subject to the order of the court* to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable." (Italics added.)

And, defendants' ex parte application and nondisclosure of that application were done in connection with the objectives of that proceeding—obtaining the disposition order. (See *Anderson v. Geist* (2015) 236 Cal.App.4th 79, 87 (*Anderson*) [recognizing holding in *Kemps v. Beshwate* (2009) 180 Cal.App.4th 1012, 1017-1018 that "defense attorney's application to the court for a bench warrant to compel the attendance of a witness" was protected petitioning activity].)

Moreover, LAPD initially retained Wright's property through a valid search warrant, continued to retain the property in accordance with his *agreement* under the 2006 plea agreement and order that LAPD would do so until Wright provided proof of ownership of the firearms, and destroyed the property after successfully applying for the 2013 disposition order.[14] Construing section 425.16 broadly, as we must (§ 425.16, subd. (a); *Rand, supra*, 6 Cal.5th at p. 619), we conclude the trial court correctly found the City's participation in the criminal action and related special proceedings[15] to obtain court orders to retain and then destroy Wright's property was protected speech or petitioning activity.

As defendants note, a look at the litigation privilege, codified at Civil Code section 47, is useful at this stage.

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[14] The LAPD never had a court order authorizing it to return all the remaining firearms to Wright. Without a court order, it could not do so. (Pen. Code, § 1536.)

[15] "If no criminal action is pending, an owner's motion for return of seized property is classified as a special proceeding." (*Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547.)

The privilege " 'applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Rusheen, supra*, 37 Cal.4th at p. 1057.) Although not all communications protected by the litigation privilege are protected activity under section 425.16, both statutes "serve similar policy interests, and courts 'look[ ] to the litigation privilege . . . as an aid in construing the scope of section 425.16, subdivision [(e)(2)]' " in the first step of the anti-SLAPP inquiry. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263 (*Neville*), quoting *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.)

Our Supreme Court's analysis of the litigation privilege's application to an anti-SLAPP motion in *Rusheen* is particularly helpful. There, the Court held "where the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." (*Rusheen, supra*, 37 Cal.4th at p. 1052.)

In *Rusheen*, a cross-complainant sued for abuse of process based on the cross-defendant's filing of allegedly false declarations of service to get a default judgment and writ of execution allowing him to levy on the cross-complainant's property to satisfy the judgment. (*Rusheen, supra*, 37 Cal.4th at p. 1053.) The Court concluded "the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service." (*Id.* at p. 1062.) Because the litigation privilege applied to the filing of the false declarations—communications made in a judicial proceeding to obtain the objectives of the litigation—it also "protect[ed] against torts arising from the privileged

declarations." (*Ibid.*) Thus, "the postjudgment enforcement efforts, including the application for writ of execution and act of levying on property, were protected by the privilege." (*Id.* at p. 1052.) The trial court's striking of the cross-complaint under section 425.16 therefore was proper. (*Id.* at p. 1065.)

The City similarly destroyed Wright's guns in accordance with a court order authorizing it to do so. Wright alleges the City got that order by filing an ex parte application and concealing it from Wright—actions in furtherance of its litigation objectives—and through misrepresentations to the court—communications made in a judicial proceeding. The City's noncommunicative acts of holding and then destroying the guns, therefore, necessarily arose from the privileged communications the City, through its employees, made to the court.

ii. *Defendants may invoke the protections of the anti-SLAPP statute*

Wright nevertheless contends LAPD's activities, including participation in the 2011 property return proceedings, did not concern protected petitioning activity because they were part of LAPD's ministerial duties and had no private counterpart. Wright's arguments are unavailing.

Wright primarily relies on *Anderson, supra,* 236 Cal.App.4th 79, to contend "the performance of litigation-related ministerial duty by law enforcement is not" protected by the anti-SLAPP statute.[16] There, the court held the execution of a

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[16] Wright also relies on *United Nurses Associations of Cal. v. N.L.R.B.* (9th Cir. 2017) 871 F.3d 767, 788. There, the court explained a request to a National Labor Relations Board official to perform a ministerial, nondiscretionary task was not immune from suit under the *Noerr-Pennington* doctrine, which has

warrant was not protected activity under section 425.16. (*Anderson,* at p. 86.) The plaintiff in *Anderson* sued two sheriff's deputies for unlawfully entering her home and attempting to arrest her daughter under a recalled bench warrant. She also alleged the deputies made defamatory statements to her neighbors during the process. (*Id.* at p. 82.)

The court acknowledged the anti-SLAPP statute is "broad enough to encompass some acts by governmental entities and their representatives." (*Anderson, supra*, 236 Cal.App.4th at p. 86.) The court concluded, however, that the execution of an arrest warrant, though " 'an act in furtherance of criminal prosecution,' " was not "necessarily . . . 'conduct in furtherance of the exercise of the constitutional right of petition' in the meaning of section 425.16, subdivision (e)(4)." (*Id.* at p. 87.)

In affirming the trial court's denial of the deputies' anti-SLAPP motion, the court opined that "[b]ecause peace officers have no discretion in whether . . . to execute a warrant issued by the court, it seems unlikely that a lawsuit asserting claims arising from such activity could have the chilling effect that motivated the Legislature to adopt the anti-SLAPP statute, or that extending protections of the anti-SLAPP statute to

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similarities to section 425.16, because the request was *indirect* petitioning. (*United Nurses,* at pp.786-788.) The court did not find it was not petitioning activity at all, as Wright implies. Rather, that doctrine protected only *direct* petitioning in the labor law context. (*Ibid.*) Moreover, the court here had discretion to issue the orders defendants asked for in the 2011 property return and 2013 disposition proceedings.

such activity would serve the statute's goals." (*Anderson*, *supra*, 236 Cal.App.4th at p. 87.)[17]

Wright analogizes the LAPD's retention and destruction of his property to the execution of the warrant in *Anderson*, arguing "[b]oth matters concern acts taken as part of the ministerial, custodial duties of law enforcement agencies and officers who execute search warrants." Wright contends that even if the gravamen of his claims were defendants' request for the disposition order and participation in the property return proceedings, under *Anderson* that conduct could not meet the " 'in furtherance of' requirement of section 425.16."

We disagree. In *Anderson*, the plaintiff's claims were based on *the manner* in which the deputies executed the warrant, not statements they made in connection with obtaining the warrant. Wright is not suing the City for how it executed the disposition order or how (for the most part) it retained Wright's property.[18] Wright's claims stem from defendants' participation in the criminal and special proceedings and their alleged wrongful conduct in getting the disposition order—in other words, from the defendants' petitioning activity—and then carrying out the terms of that order. (*Cf. Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1439 [employees'

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[17] The court also found the deputies failed to explain how the execution of a warrant in "a routine misdemeanor" was " 'in connection with a public issue or an issue of public interest,' " as required by subdivision (e)(4). (*Anderson, supra*, 236 Cal.App.4th at p. 87.) Defendants here did not move under subdivision (e)(4).

[18] See footnote 12, *ante*.

statements made "in the implementation of [a] policy decision to undertake disciplinary proceedings," even if part of their ministerial acts, were protected by the litigation privilege].)[19]

b. *The deceit claims arise from protected activity*

Wright grounds his deceit claims on the City's alleged misrepresentations during and after the property return proceedings and in obtaining the disposition order. He argues those misrepresentations "furthered no First Amendment right"[20] and were not made " 'in connection with an issue under

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[19] Wright's reliance on *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416 and *Vargas v. City of Salinas* (2009) 46 Cal.4th 1 is also misplaced. In *Montebello*, former city council members' participation in voting on a government contract was protected activity under section 425.16, though it was "not expressive activity of the kind that might be engaged in by private individuals or entities." (*Montebello,* at p. 425, fn. 13.) And, *Vargas* clearly states that section 425.16 protects all statements described by subdivision (e), "without regard to whether the statements are made by private individuals or by governmental entities or officials." (*Vargas*, at pp. 17-18.)

[20] This is essentially the same argument Wright made on his property claims. Quoting *Garcetti v. Ceballos* (2006) 547 U.S. 410, 416-417, he argues defendants, public employees, had " 'no personal interest in the content of that speech that gives rise to a First Amendment right.' " (Italics omitted.) That case did not involve section 425.16. The Court made that statement in holding the First Amendment did not "shield[ ] from discipline the expressions employees make pursuant to their professional duties." (*Garcetti,* at p. 426.)

consideration or review' " by a judicial or official proceeding. We disagree.[21]

A "statement is 'in connection with' litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville, supra*, 160 Cal.App.4th at p. 1266; see also *Anderson, supra*, 236 Cal.App.4th at p. 89 ["The phrase 'in connection with' implies the statement must be aimed at achieving the objects of the litigation."].)

Here, the alleged misrepresentations Edwards and Tompkins made to Wright related to the substance of the Ventura court property return proceedings—the determination of whether Wright was entitled to the return of the seized firearms—and were directed to Wright and his counsel—persons with an interest in that litigation.

The statements also were about a matter "under consideration or review" by the court. Wright contends that in conversations in September and October 2011 (after the hearing and in the days following), the individual defendants lied about their belief Wright continued to have an ownership interest in the remaining firearms and about their willingness to return them, "solicit[ing]" additional proof of ownership from Wright. Defendants allegedly concealed their belief that the 2011 order "divested [Wright] of all ownership interest of the firearms." Wright alleges defendants' misrepresentations were part of

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[21] As we already have concluded, defendants' alleged misrepresentations to the Los Angeles court to obtain the disposition order were communications falling under section 425.16, subdivisions (e)(1) and (2).

a ruse to lull him into forfeiting "any additional relief" he could request from the courts. After the entry of the 2011 order, Tompkins and Edwards allegedly continued to misrepresent to Wright and his counsel that they were reviewing Wright's documents and would release the remaining guns to him if he provided additional proof of ownership.

Defendants' alleged statements before the 2011 order was entered certainly were made while the issue of the firearms' return was pending before the Ventura court. Thus section 425.16, subdivision (e)(2) protects them. We also conclude that defendants' alleged continued misrepresentations about returning Wright's firearms related to a matter that continued to be under review or consideration by the court.

As Wright alleged, and the Ninth Circuit agreed, the 2011 order did not decide the fate of the remaining guns. The Ventura court left "the final resolution" of those guns "for another day." (*Wright, supra*, 723 Fed. Appx. at p. 392.) Based on Wright's allegations and his counsel's declaration, defendants' alleged misrepresentations about returning his property arose from negotiations directed by the court. According to them, the Ventura court judge "instructed the parties . . . to further negotiate over the remaining firearms and submit any further controversies regarding them back to his courtroom at a later date." At the hearing on defendants' anti-SLAPP motion, Wright's counsel clarified that Wright's claims "relate to a factual scenario in which [the Ventura court's] 2011 order was not dispositive as to all the firearms and in fact ordered the parties to meet and confer as to Mr. Wright's ownership interest in the remaining firearms." Thus, defendants' continuing alleged misrepresentations were made in connection with that "meet and

confer" process, and the return of the remaining firearms was subject to the Ventura court's further consideration and review.

Moreover, statements made during settlement negotiations—even if in bad faith or fraudulent—are subject to the anti-SLAPP statute. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-964.) As statements made in connection with resolution of Wright's motion for return of property, defendants' alleged misrepresentations have the air of protected settlement negotiations, even if defendants did not intend to return Wright's property. (See, e.g., *Suarez v. Trigg Laboratories, Inc.* (2016) 3 Cal.App.5th 118, 123 ["Communications in the course of settlement negotiations are protected activity within the scope of section 425.16 . . . even against allegations of fraudulent promises made during the settlement process."].)

The alleged misrepresentations also can be considered statements made in anticipation of litigation—communications equally protected under the anti-SLAPP statute. (*Briggs, supra*, 19 Cal.4th at p. 1115 [" '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) . . . such statements are equally entitled to the benefits of section 425.16' "].) Defendants very well could have anticipated that Wright would file another motion for return of property or seek some other judicial review after the Ventura court did not order the return of all of his firearms.

And, as the trial court found, Wright's contention that the posthearing statements were made "to induce him not to appeal the [2011 order] . . . supports the view that the litigation was still ongoing and that the statements were strategic in nature and

made to achieve [d]efendants' litigation objectives." (See, e.g., *Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1542 [claims arising from litigation strategy subject to anti-SLAPP statute].) As Wright alleges, defendants wanted him to give up his right to judicial review of the 2011 order—a litigation objective their alleged misrepresentations apparently achieved.

Wright nevertheless contends defendants' posthearing communications were contrary to, rather than in furtherance of, their petitioning activity because they claimed Wright had no ownership interest in the remaining firearms under the 2011 order.[22] We are not persuaded. Litigants often retreat from firm litigation positions to settle matters—even after a court has issued an order on the subject. Here, the City could have agreed to review further Wright's proof of ownership to forestall another motion, even though it had found his proof to that date unsatisfactory.

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[22] Wright also contends defendants are judicially estopped from taking the position that the 2011 order did not address the remaining firearms as the Ninth Circuit found. We disagree. Although defendants argued the 2011 order adjudged Wright's ownership rights as to all of his firearms, on our de novo review we cannot construe the 2011 order contrary to the Ninth Circuit's ruling. "[J]udicial estoppel 'is an equitable doctrine aimed at preventing fraud on the courts.' " (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 469.) There is no fraud here—defendants' position on appeal adheres to the Ninth Circuit's ruling adopting Wright's view of the 2011 order. Having asked for that ruling, Wright cannot contend defendants' acceptance on appeal of his interpretation of the order is unjust or a surprise.

Moreover, the City opposed Wright's motion for return of property based on its determination that he had not provided adequate proof of ownership of those guns. LAPD objected to the remaining firearms' release "unless [Wright] c[ould] otherwise establish proof of ownership." And, according to Wright's counsel, at the hearing on Wright's motion, the City's attorney argued LAPD needed more time to review Wright's proof of ownership materials. Wright had submitted receipts and an affidavit of ownership with his reply brief only the day before the hearing. Thus, defendants' alleged misrepresentations about the return of Wright's firearms upon proof of ownership and their continued review of his materials furthered their stated litigation position in that proceeding.

Wright's counsel made this same argument at the hearing on defendants' motion. The trial court disagreed. As the court so aptly put it, "It's all about the whole proceeding." The court explained, "I don't think you have any case law that says just because the communications about a proceeding may appear to your side to be inconsistent they are not in furtherance of the proceeding. This whole thing takes place in the context of the proceeding."

We agree with the trial court. Wright has presented no authority suggesting the phrase "in furtherance of" was intended to exclude from section 425.16 protection, or the litigation privilege as discussed below, statements contrary to or different from a litigant's original position. Here, the whole proceeding concerned the guns and defendants' statements furthered their objective.

3. ***Prong two: probability of prevailing on the merits***

In the second part of the anti-SLAPP inquiry, we must determine whether Wright has shown a probability of prevailing on his claims by demonstrating each of them is "legally sufficient and factually substantiated." (*Baral, supra*, 1 Cal.5th at pp. 395-396.) Wright must show "his case has at least minimal merit." (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 211 (*Finton*).)

a. *The litigation privilege applies to Wright's claims*

As our Supreme Court has stated, " 'communications with "some relation" to judicial proceedings' are 'absolutely immune from tort liability' by the litigation privilege." (*Rusheen, supra*, 37 Cal.4th at p. 1057.) That immunity "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Ibid.*) " 'The breadth of the litigation privilege cannot be understated. It immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution.' " (*Finton, supra*, 238 Cal.App.4th at p. 212.) " 'Any doubt about whether the privilege applies is resolved in favor of applying it.' " (*Ibid.*)

Wright contends the trial court incorrectly applied the litigation privilege to include "independent noncommunicative acts," did not consider if defendants' communications were made in a judicial proceeding, and erred in finding defendants made their alleged misrepresentations " 'to achieve [their] litigation objectives.' "

i. *Wright's property claims arise from privileged communications*

Wright's damages arising from his property claims are primarily based on the City's procurement of the disposition

order through its alleged misrepresentations to the court. (Cf. *Rusheen, supra*, 37 Cal.4th at p. 1062.) Because the litigation privilege applies to those alleged misrepresentations—communications made in a judicial proceeding to achieve the objectives of the litigation (the disposition order)—it also "protects against torts arising from" those privileged communications: here, the destruction of Wright's firearms. The City's execution of the disposition order is akin to the execution of the writ to levy on the claimant's property in *Rusheen*. The litigation privilege thus extends to the City's destruction of Wright's firearms, as authorized by the disposition order, as a noncommunicative act *necessarily related* to its privileged court statements. (*Id*. at p. 1052.) Accordingly, there is no reasonable probability Wright will prevail on his property claims based on the destruction of his firearms because defendants' alleged wrongful conduct was privileged.

Wright contends the thrust of his property claims arose when LAPD decided it would not return the seized firearms to him, years before defendants sought the 2013 disposition order. He alleges the City's continued retention of his guns after he provided proof of ownership intentionally and substantially interfered with his property.

As with the destruction of the firearms, defendants' liability for holding Wright's property necessarily is related to their communications in the Los Angeles and Ventura court proceedings. Defendants' activities in obtaining, opposing, following, and carrying out the courts' orders are privileged communications and communicative conduct. To release the seized property, defendants necessarily had to communicate with the court. (Pen. Code, § 1536.)

And, to the extent Wright claims defendants wrongfully retained his property through misrepresentations, his claims also are barred because those misrepresentations fall under the litigation privilege.

ii. *Wright's deceit claims are based on privileged communications*

(a) Defendants made the alleged statements in a judicial proceeding

To the extent Wright's deceit claims are based on defendants' alleged misrepresentations and acts of concealment in the 2013 disposition order proceeding, they are barred by the litigation privilege. Wright's deceit claims also are barred because, as the trial court put it, they "are all expressly premised on alleged misrepresentations concerning the City's position and understanding of the [2011 order]." As we concluded in our discussion of prong one, defendants' alleged misrepresentations made before the 2011 order was entered undisputedly were made in a judicial proceeding; they thus are protected by the litigation privilege.

And, as we also concluded, defendants' misrepresentations after the entry of the 2011 order were made in the context of the negotiations directed by the court, in the context of discussions to settle Wright's claim to the rest of the guns, and/or in the context of further anticipated litigation by Wright to seek return of those firearms. Just as defendants made those communications in connection with a matter before a judicial or official proceeding under section 425.16, subdivision (e)(2), they also made them in a judicial proceeding for purposes of the litigation privilege. (See *Rusheen, supra*, 37 Cal.4th at p. 1057 [litigation privilege is not limited to statements made during the proceeding but "extend[s] to steps taken" before or after it]; *Briggs, supra*, 19

Cal.4th at p. 1115 [Civil Code section 47, subdivision (b) protects communications in anticipation of litigation].)[23]

(b) Defendants made the alleged statements to achieve their litigation objectives

Wright contends the litigation privilege does not protect defendants' posthearing communications because they did not make them in furtherance of their litigation objectives—the same argument he made to contend those communications did not fall under section 425.16, subdivision (e)(2). We remain unpersuaded.

Our reasoning equally applies to the litigation privilege. We do not repeat it here. Defendants' alleged misrepresentations about the return of Wright's remaining firearms, their review of his proof of ownership materials, and their position on the scope of the 2011 order all related to the issue being litigated: whether Wright was entitled to get his guns back. They thus were made to achieve defendants' litigation objectives.

Accordingly, Wright cannot establish a probability of prevailing on the merits of his three deceit claims. The litigation privilege applies to the alleged misrepresentations on which each of those claims is based.

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[23] Having concluded the litigation privilege bars Wright's deceit claims, we need not consider defendants' contention that they also are barred for lack of evidence and Wright's failure to present a proper claim for damage to the City.

b. *The Ninth Circuit's finding that Wright was not collaterally estopped from pursuing his property claims does not require reversal*

Based on the federal district court's ruling that the 2011 order had decided Wright had no right to the remaining firearms, the trial court concluded the doctrine of collateral estoppel barred Wright's property claims "[t]o the extent" they did "not rely on privileged communications." The Ninth Circuit has since reversed the district court's ruling, making the doctrine of collateral estoppel inapplicable.

The trial court's order does not say what parts of Wright's property claims it concluded were not barred by the litigation privilege. Based on our de novo review, Wright's property claims pursued in this appeal—the alleged wrongful retention and destruction of his guns—are barred by the litigation privilege, as we have discussed.

Wright also alleges defendants wrongfully retained his property by not accepting his "proof of ownership" declaration in violation of LAPD's policy. This basis for relief is inexorably intertwined with the litigation over the return of his guns, however. We cannot parse out defendants' alleged violation of LAPD policy from the litigation proceedings before the Ventura court. The very declaration Wright contends defendants improperly rejected was impliedly rejected by the Ventura court. The day before the hearing on his motion for return of his firearms, Wright filed and served his proof of ownership declaration[24] and receipts referenced in his declaration with his

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[24] Wright submitted the same declaration of ownership, signed September 27, 2011, in support of his opposition to defendants' anti-SLAPP motion.

reply brief. He argued that declaration and referenced receipts satisfied LAPD's policy for return of firearms.[25] We can infer the Ventura court rejected Wright's argument and concluded this evidence did not compel the return of firearms listed in the declaration. Instead, as we have described, the court directed the parties to continue to negotiate over the release of those guns and return to court if needed.

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[25] That policy states: "[LAPD] must accept any reasonable proof of ownership. Registration in the name of the lawful owner shall constitute proof of ownership. However, a lack of registration does not constitute a lack of proof of ownership unless registration is required by law for possession and/or ownership of the gun. Unless there is articulable probable cause to disbelieve a sworn declaration from the claimant/owner, a sales receipt, or other proof of ownership from the claimant, shall constitute proof of ownership."

Wright contends his sworn declaration satisfied the LAPD policy because LAPD did not articulate "probable cause to disbelieve" it. But Wright cited no authority that a declaration alone constitutes proof of ownership under the policy or what information the policy requires the declaration to contain. Wright's declaration identifies receipts and the names on the receipts for some of the listed firearms. The receipts, however, are not part of the record on appeal. And, most of Wright's entries do not mention a receipt. Several paragraphs include entries, such as, "I acquired [description of item number and firearm] [a] curio and relic from a private party transfer." Sometimes Wright includes the year in which he purchased the firearm, but not the exact date. On this record, we cannot say Wright's declaration satisfied the LAPD requirements as a matter of law requiring it to return to Wright all the identified firearms, as Wright seems to imply.

Whether Wright's declaration was sufficient proof of ownership of the remaining firearms under LAPD policy was part of the negotiations arising from the property return proceedings. Thus, defendants' continued retention of Wright's guns directly arose from their protected litigation communications with Wright. Defendants continued to consider Wright's documentation either because of the court's meet-and-confer-directive or because they allegedly wanted to mislead Wright. In either scenario, defendants' refusal to return all of Wright's guns was based on the parties' communications either arising from the litigation, in connection with settlement of the litigation, or in anticipation of further litigation. It was not "wholly independent of any communicative act" as Wright argues. Wright therefore did not demonstrate he could prevail on the merits of his property claims regardless of whether collateral estoppel applied. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610 ["If the decision of a lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the lower court reached its conclusion."].)

Our affirmance of the trial court's order striking Wright's claims "is mitigated by the fact that [Wright] had adequate alternative remedies." (*Rusheen, supra*, 37 Cal.4th at p. 1064.) Wright could have sought clarification from the Ventura court on the scope of its 2011 order or moved for reconsideration; he could have returned to the Ventura court, as it expected, for a ruling on the disposition of the remaining firearms; or he could have sought

writ relief[26] from the 2011 order. Perhaps more importantly, Wright could have brought a separate statutory mandamus proceeding to compel LAPD to return his property. (See *Holt v. Kelly* (1978) 20 Cal.3d 560, 564 [arrestee could bring mandamus proceeding under Code of Civil Procedure section 1085 to compel return of his property or its value when sheriff's department took property at time of his arrest, booked arrestee into jail without giving him an accurate property receipt, and lost the property; sheriff had duty to return property under Government Code section 26640].) That Wright chose not to pursue any of those avenues because of defendants' alleged misrepresentations does not remove the communications over the return of Wright's guns from section 425.16 protection.

4. *Attorney Fees*

Wright asks us to reverse the trial court's $9,000 attorney fee award to defendants because they "knowingly misled a federal court on a material factual issue prompting this very lawsuit." The scope of our review does not include making a factual determination as to whether defendants affirmatively misled the federal court. Wright's remedy for any misrepresentations made to the federal court is with that court.

Defendants in turn ask us to determine they are entitled to attorney fees incurred on appeal under section 425.16, subdivision (c), which entitles a prevailing defendant to its attorney fees. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499 [statute authorizing attorney fees at trial level includes appellate attorney fees].) In the interests of justice, however, we decline to

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[26] An order denying a motion for return of property arising from a criminal case is not an appealable order. (*People v. Hopkins* (2009) 171 Cal.App.4th 305, 308.)

award defendants their costs on appeal, including attorney fees. (Cal. Rules of Court, rule 8.278(a)(5).)

DISPOSITION

The trial court's order granting defendants' anti-SLAPP motion is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P.J.

MURILLO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.